No. 299

FILED
AUG 5 19[illegible]
[illegible] WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

GEORGE A. LANDELL, Executor of E. A. Landell, deceased, ROBERT W. LISHMAN, Trustee for Margaret H. Fearon and Elinor H. Lishman, and PAUL FREEMAN, ROBERT W. LISHMAN, ROBERT F. WELSH, not individually but solely as Committee of Minority Stockholders of the Northern Pacific Railroad Company, a Federal Corporation Organized and Existing under the Act of July 2, 1864 (13 Stat. 365), *Petitioners*,

v.

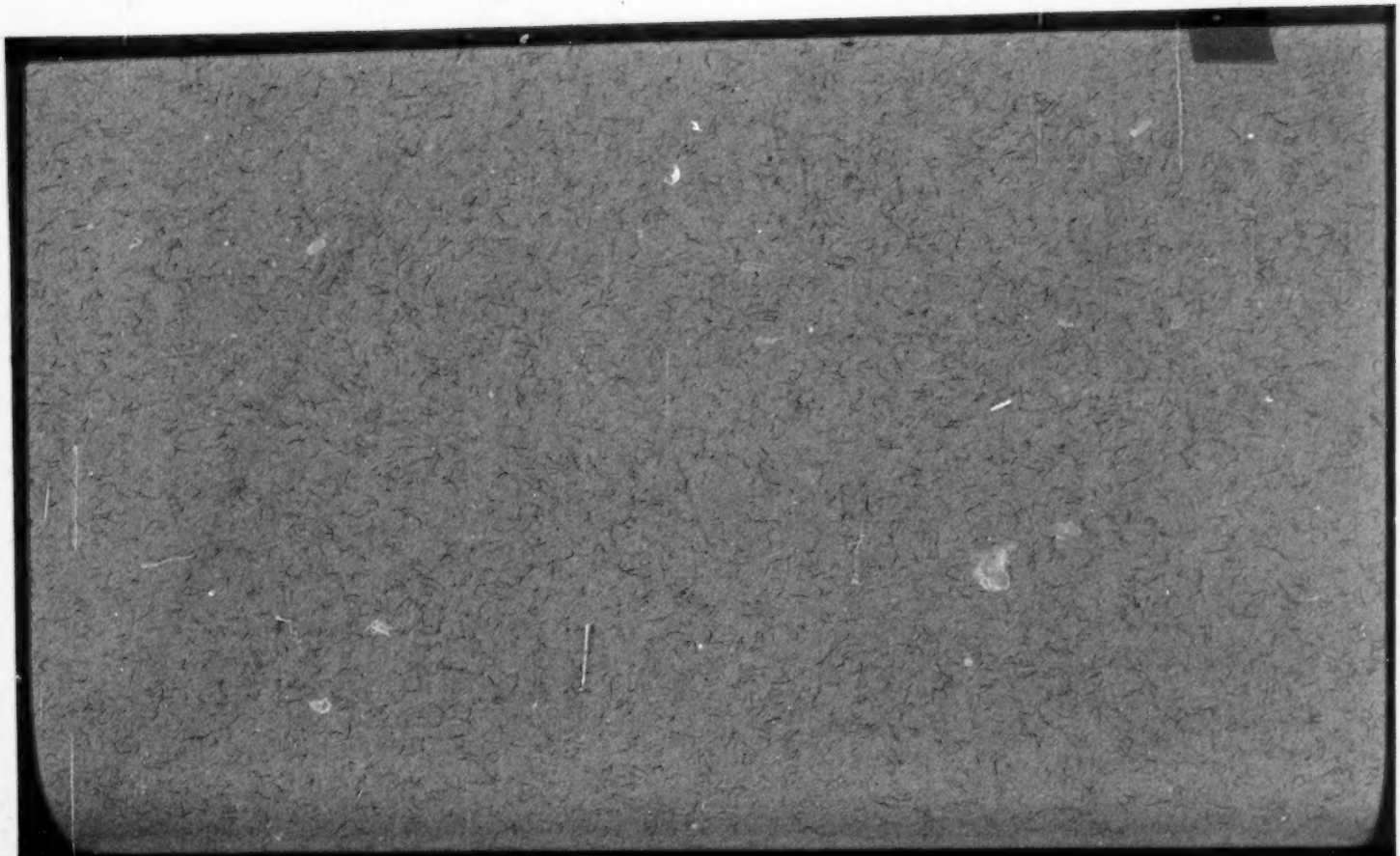
NORTHERN PACIFIC RAILWAY COMPANY, formerly known as the SUPERIOR AND ST. CROIX RAILWAY COMPANY, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

HENRY H. FOWLER,
ALEXANDER B. HAWES,
ROBERT W. LISHMAN,
MARK LEVA,
EDWARD BROWN WILLIAMS,
Attorneys for Petitioners.

FOWLER, LEVA, HAWES
& SYMINGTON,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Rule Involved	3
Statement	4
Summary of Facts	5
Reasons for Granting the Writ	11
Argument	14
Conclusion	54

Appendix A.: Opinions Below	1a
Appendix B: Statutes and Rule Involved	20a
Appendix C: Excerpts from Congressional Globe Reporting Debates on Resolution of May 31, 1870	40a
Appendix D: Petition for Rehearing before the Court of Appeals	47a

CITATIONS

Cases:

Arenas v. *U. S.*, 322 U.S. 419 (1944) 13, 51
Arnstein v. *Porter*, 154 F. (2d) 464 (C.C.A. 2d, 1948) . 30
Central Pacific Railroad Co. v. *Gallatin*, 99 U.S. 727 (1879) 20
Central Transportation Co. v. *Pullman's Palace Car Co.* 139 U.S. 24 (1891) 12, 44, 45, 46, 47
Comm'rs of Leavenworth County v. *Chicago, R. I. & P. Ry.*, 18 Fed. 209 (W.D. Mo. 1883) 21
DuPont v. *Northern Pac. R. Co.*, 18 Fed. 467 (1883)... 18
East Tennessee, Virginia & Georgia Railway Co. v. *Frazier*, 139 U.S. 288 (1891) 18
Eccles v. *Peoples Bank of Lakewood Village, Cal.*, 333 U.S. 426 (1948) 13, 51

Page

Ewert v. *Bluejacket*, 259 U.S. 129 (1922) 11, 16
Ex Parte Northern Pacific R. R. Co., 308 U.S. 508 (1939) 10
First National Bank of Cincinnati v. *Flershem*, 290 U.S. 504 (1934) 26
Gardner v. *Panama Railroad*, 342 U.S. 29 (1951) 27
Great Northern Railway Co. v. *Steinke*, 261 U.S. 119 (1923) 12, 47
Hanover Star Milling Co. v. *Metcalf*, 240 U.S. 403 (1916) 12, 47, 48
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, 322 U.S. 238 (1944); reh. den. U.S. 722 (1944).....11, 21, 22
Hoover v. *Northern Pacific Railway Company, et al.* (U.S. D.Ct., So. D. N.Y.) 30, 31
Inhabitants of Stoughton v. *Baker*, 4 Mass. 522 (1809) 15
Johnson v. *Waters*, 111 U.S. 640 (1884) 11, 23
Kennedy v. *Silas Mason Co.*, 334 U.S. 249 (1948) .13, 51, 52
Leavenworth County v. *Chicago, R.I. & P. Ry. Co.*, 134 U.S. 688 (1890) 21
Louisville & Nashville Railroad Co. v. *Kentucky*, 161 U.S. 677 (1896) 42
Menendez v. *Holt*, 128 U.S. 514 (1888) 12, 47
Northern Pacific Ry. Co. v. *Boyd*, 177 Fed. 804 (C.C.A. 9th, 1910); aff'd 228 U.S. 482 (1913) 12, 35, 42
Northern Pacific Railway Company v. *Townsend*, 190 U.S. 267 (1903) 47
Northern Pacific Railroad Co. v. *United States*, 304 U.S. 545 (1938) 10
Northern Pacific R.R. Co. by Schmidt v. *United States*, 308 U.S. 508 (1939) 10, 33
Oregon & California Railroad Co. v. *United States*, 238 U.S. 393 (1915), 243 U.S. 549 (1917) 11, 14, 15, 17
Oregon Ry. and Nav. Co. v. *The Oregonian Ry. Co.*, 130 U.S. 1 (1889) 42
Palmer v. *Chamberlin*, 191 F. (2d) 532 (C.C.A. 5th, 1951) 13, 51
Pennsylvania R.R. Co. v. *St. Louis, etc. R.R. Co.*, 118 U.S. 290 (1886) 12, 44, 45
Roberts v. *Northern Pacific Railroad Co.*, 158 U.S. 1 (1895) 6, 16, 42
Root Refining Co. v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C.C.A. 3d, 1948), cert. den. 335 U.S. 912 (1949), reh. den. 336 U.S. 915 (1949).....11, 21, 23, 24

Page

Schmidt v. *United States*, 304 U.S. 545 (1938) 10
Schmidt v. *United States*, 102 F. (2d) 589 (C.C.A. 9th 1939) 10
Shaffer v. *Rector Well Equipment Co.*, 155 F. (2d) 344 (C.C.A. 5th 1946) 11, 12, 27, 32, 34, 35, 47, 48
Southern Oregon Co. v. *United States*, 124 Fed. 16 (C.C.A. 9th, 1917); remanded on joint motion, 249 U.S. 589 (1919) 11, 15
Southern Pacific Co. v. *Bogert*, 250 U.S. 483 (1919) ..11, 12, 27, 28
Stoddard v. *Chambers*, 43 U.S. 284 (1844) 11, 22
Texas & Pac. R. Co. v. *Pottorff*, 291 U.S. 245 (1934) .. 44
Union Pacific Railroad Co. v. *United States*, 99 U.S. 700 (1879) 20
U. S. v. *Northern Pacific R.R. Co.*, 95 F. 864 (C.C.A. 8th, 1899) 38, 44
United States v. *Northern Pacific Railway Co.*, 309 U.S. 626 (1940) 10
United States v. *Northern Pacific Railway Co.*, 311 U.S. 317 (1940); 311 U.S. 613 (1940) 10, 20, 32, 38, 40
United States v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273 (D. Wash. 1941) 10
United States v. *Southern Pacific Co.*, 259 U.S. 214 (1922) 44

CONSTITUTION, STATUTES AND RULE:

Constitution, Article I, Sections 1 and 8, Clauses 1, 3, 7, 9 and 18; Article III, Sections 1 and 2; Article IV, Section 3, Clause 2; Amendment V 4
Act of July 2, 1864, 13 Stat. 365 .....3, 4, 5, 16, 19, 36, 37, 43, 50, 51, 53, 55, 20a-35a
Act of July 1, 1898, 30 Stat. 597, 620 .....3, 8, 36a
Act of June 25, 1929, 46 Stat. 41 .....3, 36a
Joint Resolution of May 31, 1870, 16 Stat. 370 ....3, 4, 6, 17, 18, 43, 51, 34a
11 D. C. Code, Secs. 301 and 305, as amended 4
Idaho: Revised Statutes 1887, Sec. 2666 25
Minnesota: Statutes 1894, Sec. 5877 25
Montana: Codes 1895—Title VIII, Sec. 894 25
North Dakota: Revised Codes 1895, Sec. 2497 25

Page

Oregon: Hill's Annotated Codes and Laws 1887, Vol. 2, Sec. 3321 25
Revised Statutes of Wisconsin 1878, Sec. 1833, as amended by Ch. 260, 1880, Ch. 268, 1882, Ch. 293, 1883 .....3, 24, 36a-38a
Wisconsin: Statutes 1889, Sec. 1828 25
Rule 56 of Federal Rules of Civil Procedure 3, 49, 55, 38a-40a

MISCELLANEOUS:

Elliott on Railroads, 3rd Ed., Sec. 79 42
Fletcher on Corporations (Permanent Edition 1931), Vol. 7, Sec. 3343 42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. .....

GEORGE A. LANDELL, Executor of E. A. Landell, deceased, ROBERT W. LISHMAN, Trustee for Margaret H. Fearon and Elinor H. Lishman, and PAUL FREEMAN, ROBERT W. LISHMAN, ROBERT F. WELSH, not individually but solely as Committee of Minority Stockholders of the Northern Pacific Railroad Company, a Federal Corporation Organized and Existing under the Act of July 2, 1864 (13 Stat. 365), *Petitioners,*

v.

NORTHERN PACIFIC RAILWAY COMPANY, formerly known as the SUPERIOR AND ST. CROIX RAILWAY COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

George A. Landell, Executor of E. A. Landell, deceased, Robert W. Lishman, Trustee for Margaret H. Fearon and Elinor H. Lishman, and Paul Freeman, Robert W. Lishman, Robert F. Welsh, not individually but solely as Committee of Minority Stockholders

of the Northern Pacific Railroad Company, a federal corporation organized and existing under the Act of July 2, 1864 (13 Stat. 365), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 14, 1955, affirming a judgment of the United States District Court for the District of Columbia.

OPINIONS BELOW.

The opinion of the United States District Court for the District of Columbia per McLaughlin, J., denying Respondent's first motion to dismiss (R. 135) is reported in 98 F. Supp. 479 (1951). The opinion of the same court, per Tamm, J., granting Respondent's second motion to dismiss (R. 123) is reported in 122 F. Supp. 253 (1954). The per curiam opinion of the United States Court of Appeals for the District of Columbia Circuit, is not yet reported. All three opinions are printed in Appendix A, hereto.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on April 14, 1955. (R. 559.) Rehearing was denied on May 11, 1955. (R. 590.) The rehearing denial order was amended on May 25, 1955. (R. 591.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the courts below err in holding laches to be a bar to Petitioners' cause of action under circumstances where:

   a. The cause of action is founded upon a violation of a statute establishing a statutory con-

tract and expressing an important public policy?

b. The cause of action is founded upon error in a judicial decision induced by a fraud on the court?

c. There has been no lack of diligence on the part of Petitioners?

d. There has been no inexcusable delay on the part of Petitioners?

e. Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting suit?

2. Even though laches may bar recovery for past damage, did the courts below err in refusing to protect Petitioners' existing and continuing rights under the Act of July 2, 1864, in the railroad and telegraph franchises and right of way, which, in any event, Respondent was not competent to acquire?

3. Did the courts below err in using, and approving the use of, summary judgment procedure to determine a complicated case involving important public issues?

STATUTES AND RULE INVOLVED.

The statutory provisions involved are the Act of July 2, 1864, 13 Stat. 365; the Joint Resolution of May 31, 1870, 16 Stat. 370; a proviso in the Act of July 1, 1898, 30 Stat. 597, 620; Section 4 of the Act of June 25, 1929, 46 Stat. 41; Revised Statutes of Wisconsin 1878, sec. 1833, as amended by Ch. 260, 1880, Ch. 268, 1882, Ch. 293, 1883. The rule involved is Rule 56 of the Federal Rules of Civil Procedure. The texts of these statutory provisions and rule are printed in Appendix B, *infra,* pp. 20a-39a.

STATEMENT.

Nature of Proceeding and Present Status.

Petitioners are holders of a minority of the stock (about 30,000 shares or 3%) of the Northern Pacific Railroad Company, an existing federal corporation (herein sometimes called "Railroad"), created by Act of Congress of July 2, 1864. Respondent Northern Pacific Railway Company, a Wisconsin corporation (herein sometimes called "Railway"), claims to be successor to Railroad and holds a majority of the stock (about 97%) of Railroad.

Petitioners seek a judgment (1) that the decrees of foreclosure and sale of Railroad's property entered by the United States Circuit Court for the Eastern District of Wisconsin under which Respondent claims such successorship are null and void, (2) that Respondent has no title to Railroad's franchise, railroad, or right of way, (3) that Respondent account for Railroad's property and profits realized therefrom, and (4) that Railroad has received such property and profits in trust for Petitioners.

Petitioners brought this action in the District Court for the District of Columbia on December 20, 1950, invoking the jurisdiction of that court, under 28 U. S. C., section 133, on the ground that the action arose under the Constitution and laws of the United States (Constitution, Article I, Sections 1 and 8, Clauses 1, 3, 7, 9, and 18; Article III, Sections 1 and 2; Article IV, Section 3, Clause 2; and Amendment V; Act of July 2, 1864 [13 Stat. 365] and Joint Resolution of May 31, 1870 [16 Stat. 370]). The general equity jurisdiction of the District Court was also invoked under 11 D. C. Code, Sections 301 and 305, as amended.

Respondent first moved the District Court to dismiss for (a) improper venue, (b) lack of service, and (c) forum non conveniens. The court, per McLaughlin, J., overruled this motion. (R. 135; Appendix A, p. 1a.)

Thereafter, Respondent moved for summary judgment in the District Court upon the ground that relief for Petitioners was barred by laches and the statute of limitations. (R. 271.) The court, per Tamm, J., granted the motion for summary judgment, basing its action upon its view that Petitioners were guilty of laches. (R. 123; Appendix A, p. 8a.)

On appeal, the Court of Appeals affirmed, per curiam, the summary judgment of the District Court on the basis of Judge Tamm's opinion. (R. 558; Appendix A, p. 18a.)

Summary of Facts.

Railroad was incorporated by Act of Congress of July 2, 1864 (13 Stat. 365; R. 198; see Appendix B, p. 20a).

By Section 1, the corporation was granted a franchise to construct and enjoy a continuous railroad and telegraph line from Lake Superior to Puget Sound. Section 2 granted a right of way for this purpose, exempt from taxation. In aid of construction Section 3 of the Act also granted approximately 43,000,000 acres of public land.

The national character of the railroad was indicated by the provisions of Section 11, under which the railroad was made "a post route and a military road, subject to the use of the United States, for postal, military, naval and all other governmental services." Section 3

also referred to the purpose "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway." The concept of this particular railroad as a national highway was fully recognized and expounded by this Court in *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1 (1895).

Section 10 of the Act provided that "all people of the United States shall have the right to subscribe to the stock of the Northern Pacific Railroad Company . . ." and other provisions spelled out in detail the mechanics of opening the books to receive stock subscriptions. Section 10 further provided that "no mortgage or construction bonds shall ever be issued by said company on said road, or mortgage, or lien made in any way, *except by the consent of the congress of the United States.*" (Emphasis supplied.)

By Joint Resolution of May 31, 1870 (16 Stat. 370; R. 213; see Appendix B, p. 33a) Congress authorized Railroad "to issue its bonds to aid in the construction and equipment of its road, and to secure the same by mortgage on its property and rights of property of all kinds and descriptions, real, personal, and mixed, including its franchise as a corporation . . ."

On July 1, 1870, the mortgage authorized by the Joint Resolution of 1870 was placed upon Railroad's property to secure an issue of bonds. This mortgage was extinguished in 1875. Sometime thereafter there occurred a series of events which resulted in what the Petitioners respectfully submit was an illegal transfer to Respondent of Railroad's property, including franchises, main line, and right of way. (R. 15-17.)

In 1893 a creditors' suit against Railroad and a foreclosure suit by the trustee of three junior mortgages were brought in the United States Circuit Court for the Eastern District of Wisconsin. These were the last three of a series of six mortgages placed upon Railroad's property in 1879, 1881, 1883, 1887, and 1889, without the consent of Congress. A reorganization plan, dated March 16, 1896, eventually was accepted by the bondholders and the holders of a majority of Railroad's stock (not including the stock held by Petitioners). Railroad then filed an answer admitting all the allegations of the bill. Thereupon, consent decrees of foreclosure of the three junior mortgages were entered which purported to authorize sales of the bulk of the property of the Railroad. (R. 18-20.)

However, and this is important for this case, the decree of foreclosure and sale dated April 27, 1896, specifically reserved, with respect to the railroad itself, the railroad and telegraph franchises, and the right of way, the question of the validity of the mortgages being foreclosed. (R. 20, 21, 22.)

On July 25, 1896, and the next few days thereafter property covered by the three junior mortgages was sold to Respondent at foreclosure sales pursuant to the decrees of April 27 and 28, 1896. (R. 26.) Subsequently in 1899 approximately 4,000,000 acres of lands and rights to lands in North Dakota and Minnesota, east of the Missouri River, were also sold to Respondent pursuant to sequestration decrees made by the United States Circuit Court for the Eastern District of Wisconsin. (R. 27, 38.)

In its petitions for orders confirming these sales, Respondent falsely and fraudulently represented to the court that it was competent to receive and own the property purchased, despite a Wisconsin law forbid-

ding acquisition of another railroad line under the circumstances of Railway's case, and despite the applicable laws of six states through which the railroad ran making it illegal for Respondent to hold land not used in railroad operations. At the same time, Respondent falsely and fraudulently represented to the court that it was an independent purchaser. In fact, Respondent from 1873 and up to 1896, was owned and controlled by the Northern Pacific Railroad Company, the federal corporation (R. 42, 44, 58-60, 158).

The order of July 27, 1896, confirming the sale of July 25, 1896, was made subject to the reservation as to the validity of the mortgages set out above, as were the several deeds conveying the railroad, franchises and right of way to Respondent. (R. 20, 22.)

Neither the Circuit Court nor any other court, at that time or since, has ever decided the question thus reserved concerning the validity of the transfer of the railroad, franchises, and right of way. (R. 21.)

The question of the validity of the transfer of lands by the foreclosure sales of 1896 has also been expressly reserved by subsequent Acts of Congress. (R. 35.) The Act of July 1, 1898, 30 Stat. 597, 620, contains this proviso:

> "*And provided, further,* That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway

Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, * * * ." (See Appendix B, p. 36a.)

Railroad still exists as a federal corporation, holding annual meetings regularly. Petitioners still receive notices of each meetings.

Petitioner Committee of Minority Stockholders of the Northern Pacific Railroad Company was duly established by agreement of October 1, 1906. It represents 852 shares of preferred and 28,278 shares of common stock in Railroad. These shares have been uninterruptedly on deposit with the Fidelity Trust Co. of Philadelphia since the early 1900's pursuant to the agreement establishing the Committee, copy of which is annexed to the complaint. (R. 3, 4.)

Prior to the formal establishment of the Committee and also subsequent thereto and continuing after the filing of this proceeding in December, 1950, the minority stockholders of Railroad have vigorously and continuously, beginning March 16, 1896, asserted, at meetings of stockholders of the federal corporation and in various other ways as set forth in the complaint herein and as set forth also in this petition and brief, the invalidity of the reorganization proceedings and decrees and the use by Respondent of the property and franchises of said corporation. Through the Committee and otherwise, the minority stockholders represented by the Committee have attempted to vindicate their rights through the appropriate officials of the United States Departments of Justice and Interior, and before the Congress of the United States, which created the rights which Petitioners are entitled to enjoy. (R. 4, 66, 69, 129.) In 1938, an attempt on behalf of certain

of the minority stockholders to intervene in a suit brought by the United States was denied, but the District Court's order denying the petition specifically reserved the rights of the attempted interveners to assert their claims in other proceedings (R. 70; see summary of this litigation in *United States* v. *Northern Pac. Ry. Co.*, 41 F. Supp. 273, 281-283 (D. Wash. 1941)); and this order was affirmed by the Circuit Court of Appeals.[1] Subsequent proceedings in connection with this litigation in this Court did not in any way impair this reservation.[2]

Respondent has not acted in reliance on the action or inaction of Petitioners in such a way as to preclude the return of the property, right of way, and franchises to Railroad. (R. 569.) In fact, Respondent has acted so as to facilitate such a return if it should become necessary. It has kept Railroad in existence. In each of five mortgages executed by Respondent since 1896 purporting to cover the franchises, right of way and other property and rights to property of Railroad, Respondent has inserted provisions authorizing it, without the consent of the mortgage trustees, to convey and transfer to a railroad corporation organized and existing under the laws of the United States all the property purported to be covered by the mortgage, subject to the continuing lien of the indenture. (R. 42, 43.)

---

[1] *Schmidt* v. *United States*, 102 F. (2d) 589 (C. C. A. 9th, 1939).

[2] *Northern Pacific Railroad Co.* v. *United States*, 304 U. S. 545 (1938); *Schmidt* v. *United States*, 304 U. S. 545 (1938); *Northern Pacific R. R. Co. by Schmidt* v. *United States*, 308 U. S. 508 (1939); *Ex Parte Northern Pacific R. R. Co.*, 308 U. S. 508 (1939); *United States* v. *Northern Pacific Railway Co.*, 309 U. S. 626 (1940); *United States* v. *Northern Pacific Railway Co.*, 311 U. S.

REASONS FOR GRANTING THE WRIT.

The decisions of the District Court and Court of Appeals are in conflict with the decisions of this Court or of other federal courts.

I. They are in conflict with decisions of this Court or of other federal courts in permitting the defense of laches to apply, although:

(A) The cause of action is founded upon a violation of a statute establishing a statutory contract or expressing an important public policy.

Oregon & California Railroad Co. v. *United States,* 238 U. S. 393 (1915), 243 U. S. 549 (1917).

Southern Oregon Co. v. *United States,* 241 Fed. 16 (C. C. A. 9th, 1917); remanded on joint motion, 249 U. S. 589 (1919).

Ewert v. *Bluejacket,* 259 U. S. 129 (1922).

(B) The cause of action is founded upon error in a judicial decision induced by a fraud on the court.

Hazel-Atlas Glass Co. v. *Hartford-Empire Co.,* 322 U. S. 238 (1944), reh. den. 322 U. S. 772 (1944).

Stoddard v. *Chambers,* 43 U. S. 284 (1844).

Johnson v. *Waters,* 111 U. S. 640 (1884).

Root Refining Co. v. *Universal Oil Products Co.,* 169 F. (2d) 514 (C. C. A. 3d, 1948), cert. den. 335 U. S. 912 (1949), reh. den., 336 U. S. 915 (1949).

(C) There has been no lack of diligence.

Southern Pacific Company v. *Bogert,* 250 U. S. 483, 488-490 (1919).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 345-347 (C. C. A. 5th, 1946).

(D) There has been no inexcusable delay in instituting suit.

Southern Pacific Company v. *Bogert,* 250 U. S. 483, 488-490 (1919).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

(E) In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting suit.

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Northern Pac. Ry. Co. v. *Boyd,* 177 Fed. 804 (C. C. A. 9th, 1910), aff'd, 228 U. S. 482 (1913).

II. Even though laches may bar recovery for past damage, the decisions below are in conflict with decisions of this Court and other federal courts in refusing to declare illegal present and future violations of Petitioners' existing and continuing rights in the railroad and telegraph franchises and right of way, which, in any event, Respondent was not competent to acquire.

Pennsylvania R. R. Co. v. *St. Louis, etc. R. R. Co.,* 118 U. S. 290 (1886).

Central Transportation Co. v. *Pullman's Palace Car Co.,* 139 U. S. 24 (1891).

Great Northern Railway Co. v. *Steinke,* 261 U. S. 119 (1923).

Menendez v. *Holt,* 128 U. S. 514 (1888).

Hanover Star Milling Co. v. *Metcalf,* 240 U. S. 403 (1916).

Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946).

III. The decisions below are in conflict with decisions of this Court and other federal courts in using summary judgment procedure to determine a complicated case involving important public issues, thereby effectively denying Petitioners an opportunity to establish the validity of their case.

Arenas v. *U. S.*, 322 U. S. 419 (1944).

Eccles v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948).

Kennedy v. *Silas Mason Co.*, 334 U. S. 249 (1948).

Palmer v. *Chamberlin*, 191 F. (2d) 532 (C. C. A. 5th, 1951).

The importance of the errors below is already indicated by the foregoing statement.

In this case, the decisions below, if allowed to stand, will permit the abrogation of a statutory contract. They will defeat an important public policy, the policy of maintaining strict supervision by Congress over the financing of a publicly sponsored national railroad. They will condone a fraud upon the United States Circuit Court for the Eastern District of Wisconsin. They will extinguish important existing, continuing rights of property granted by Act of Congress. They will do this through the grant of a summary judgment despite the existence of complicated, important public issues.

They will also constitute precedents for similar decisions in the future.

Finally they represent, both in the application of the defense of laches and in the use of summary judg-

ment, a departure from the accepted and usual course of judicial proceedings.

The importance of the errors referred to above, both in terms of this case and as precedents for the future, their departure from the accepted and usual course of judicial proceeding, and the conflict between these decisions and decisions of this Court and of other federal courts, all call for the exercise by this Court of its supervisory authority to issue a writ of certiorari to the Court of Appeals.

ARGUMENT.

I. THE COURTS BELOW ERRED IN HOLDING LACHES TO BE A BAR TO PETITIONERS' CAUSE OF ACTION CONTRARY TO APPLICABLE DECISIONS WHICH ESTABLISH THAT (A) LACHES CANNOT DEFEAT A CAUSE OF ACTION FOUNDED UPON A VIOLATION OF A STATUTE ESTABLISHING A STATUTORY CONTRACT OR EXPRESSING AN IMPORTANT PUBLIC POLICY, (B) LACHES CANNOT DEFEAT A CAUSE OF ACTION FOUNDED UPON ERROR IN A JUDICIAL DECISION INDUCED BY A FRAUD ON THE COURT, AND (C) LACHES IS NOT PRESENT UNDER SUCH CIRCUMSTANCES AS EXIST IN THIS CASE.

A.

The doctrine of laches cannot defeat a cause of action founded upon a violation of a statute establishing a statutory contract or expressing an important public policy.

The defense of laches is not permitted to sanction such a violation. Acts in violation of such statutes are void, and delay, of no matter what duration, will not lend them validity.

In *Oregon & California Railroad Co.* v. *United States,* 238 U. S. 393 (1915), 243 U. S. 549 (1917), the Court held that railroad grants had the command and effect of law. In that case defendant advanced the defense of laches, limitations, waiver, acquiescence, and estoppel, but the Court held that none of these defenses was available because the property had been acquired in violation of statute. In making this determination, the Court said, 238 U. S., at 427:

"We may observe again that the acts of Congress are laws as well as grants, and have the constancy of laws as well as their command, and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence, and estoppel, and even to the defenses of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application . . ."

See 238 U. S., at 435; also 243 U. S., at 561.

In the same case private individuals were, however, denied recovery against the railroad—not because of the defense of laches—but because the Court held the vagueness of the statute there involved precluded the existence of a trust in their favor. 238 U. S., at 434.

In *Southern Oregon Co.* v. *United States,* 241 Fed. 16 (C. C. A. 9th, 1917), the Circuit Court of Appeals had before it a case in which the grantee of public lands and its successors had violated the statutory requirements that the lands must be sold in small tracts at not more than $2.50 per acre. The statute also provided that lands unused to aid in the building of a military road reverted to the United States if the road was not built within five years from the date of the grant. The United States, forty-three years after the statutory violation had commenced, instituted suit to forfeit title to 96,000 acres on the ground of breach of conditions[1] by defendant's predecessors in title. The

[1] In the case of violation of a franchise grant even the passage of 156 years was held no bar to an action by members of a body politic and corporate seeking to compel statutory compliance by the grantee's successor. *Inhabitants of Stoughton* v. *Baker,* 4 Mass. 522 (1809).

court held that the decree below, granting such forfeiture relief, should be upheld and that defendant should account. In doing so the court considered and overruled defenses almost identical with those now urged by Respondent in the present case.

Where, also, a statute expresses an important public policy, an act in violation of the statute is void, and the defense of laches is inapplicable.

Thus, a conveyance in violation of laws made to guard Indians from the overreaching influence of federal officials assigned to protect them is a nullity, and, in spite of a delay of nine years, laches constitutes no defense to a suit to set it aside. *Ewert* v. *Bluejacket*, 259 U. S. 129 (1922).

The Act of July 2, 1864, incorporating the Northern Pacific Railroad Company, established a statutory contract and expressed an important public policy.

The policy was, in general terms, that the Northwest should be opened up by means of a railroad, 2500 miles in length, with the support and under the supervision of the national government.[1] The Act established the Railroad as a federal corporation, specified the method of its financing, established the terms and authority of its management, and reserved the power to amend the charter from time to time. In addition it granted the Railroad the necessary right of way and large tracts of land from the public domain to assist in the construction of the road.

The particular feature of the contract established by the Act and the policy it expressed which is relevant

---

[1] The national character of the road and of the grantee corporation is emphasized in *Roberts* v. *Northern Pacific Railroad Co.*, 158 U. S. 1, 20, 21 (1895).

in this case was the proposal that the Railroad be financed by and belong to the American public. Thus, the stock of the Company was to consist of one million shares of $100 par value, and the Company was required to open its stock books to public subscription in specified cities throughout the country.

By this provision, Congress in effect invited the American public to finance the national railroad, and it assumed a responsibility for the protection of those who responded to the invitation. This responsibility it proposed to discharge by such safeguards as the provisions in the Act regulating the management of the company, reserving the right to amend the charter, and, in particular, prohibiting the placing of a mortgage on the road except with the consent of Congress.

These features of the Act distinguish this case from that of the individuals involved in the *Oregon & California Railroad Co.* case, 238 U. S. 393 (1915), 243 U. S. 549 (1917), discussed above. Here, the stockholders are a readily identifiable group of persons, and the provisions cited clearly make them beneficiaries to whom, as well as to the granting sovereignty, compliance with the statute is owed.

Consent to the placing of a mortgage on the road was given by a Congressional resolution in 1870. (16 Stat. 370, Appendix B, p. 34a.) This resolution resulted from the inability of the company to secure adequate financing by means of stock subscription. Though the 1870 resolution was couched in general terms, it was designed to permit a particular issue of bonds, which were, as a matter of fact, issued beginning July 1, 1870, immediately following adoption of the resolution. (R. 16.)

A reading of the text of the resolution is sufficient to show that it was intended to authorize only the one

mortgage which was placed on Railroad's property at that time. Throughout the resolution the term mortgage is used repeatedly in the singular and never otherwise. The references are to "said mortgage", "the mortgage by this act authorized", "the mortgage hereby authorized", and "such mortgage".

The language of the Joint Resolution is clear on its face. If, nevertheless, resort is had to its legislative history, the conclusion stated above is confirmed. There were no written Committee reports on the resolution. But the Congressional Globe, in describing the resolution, referred to the mortgage authorized by it in the singular, and the Committee Chairman who reported the resolution on the floors of the Senate and House always and repeatedly referred to the mortgage authorized by the resolution in the singular. So did the opponents of the legislation. Excerpts from the debates to this effect are printed in Appendix C (p. 41a) to this petition. (See also R. 16.)

The consent given by the resolution was therefore exhausted by the issuance of the mortgage bonds in 1870.[1] These were cancelled, as a result of a fore-

---

[1] *Cf. East Tennessee, Virginia & Georgia Railway Co.* v. *Frazier*, 139 U. S. 288 (1891). In this connection, it should be noted that a different view was taken by the Circuit Court for the Southern District of New York in *DuPont* v. *Northern Pac. R. Co.*, 18 Fed. 467 (1883), where the court refused, at the suit of a stockholder, to enjoin the issuance of a series of mortgage bonds subsequent to the issue of 1870. Its reasoning has not been adopted by any other court, however. Even in the reorganization proceedings of 1896, the Circuit Court felt it necessary, at the petition of the Wisconsin Central Company, to reserve the question of validity of the mortgage so far as the railroad, the franchises and the right of way were concerned. This reservation was repeated in all the documents of transfer at that time. (R. 22.)

closure of the mortgages, in 1875. No further consent has ever been given by Congress to the creation of a mortgage on the road.

Nevertheless, beginning in 1875, six additional mortgages were placed on the road up to the time of the reorganization of 1896. (R. 18, 19.) And it is on the basis of the foreclosure of three of these mortgages that the Circuit Court ordered the sale of the franchise, right of way, and other property, which resulted in their purported acquisition by Respondent. (R. 19-21; see R. 26, 27.)

These mortgages, having been created without the consent of Congress, were void since they were in violation of Section 10 of the Act of July 2, 1864, which, as has been indicated, was an important feature of a statutory contract, and itself expressed an important public policy.

The purported foreclosure of these void mortgages, involving, as they did, a violation of the statute, was void and could not pass title to a purchaser at foreclosure sale.

As in the *Bluejacket* and other cases cited, alleged laches, therefore, constitutes no defense to a suit to set aside the purported conveyance and to restore the legal title to the Railroad Company.

The purported transfer of the franchise, right of way, and other property to Respondent by sale at foreclosure not only was void, as in violation of statute, but it represented an attempted exercise by the Circuit Court of power clearly reserved to the Congress. (R. 33, 36, 38.)

The Railroad Company was a creature of federal legislation. It was endowed with property by Con-

gressional grant. Congress intended to keep a close supervisory control over the financing, management, and operation of the road, through its reserved power to amend the Act of 1864, and its power over the creation of mortgages.[1] Thus, it refused in 1896, immediately prior to the reorganization, to sanction the transfer of the Railroad's property to Respondent. (R. 35, 183-185, 215-236.)

The effect of the Circuit Court's decree of foreclosure was to abrogate a federal statute and thus the Congressional control which was established by it for the purpose, among other things, of protecting those who invested in the nationally sponsored railroad. It abrogated this control by vesting the railroad property in a corporation which was the creature of the State of Wisconsin, subject to no direct control by Congress.[2]

Both in this case and as a possible precedent in other cases, therefore, the erroneous decisions below are of

---

[1] See *The Central Pacific Railroad Co.* v. *Gallatin*, 99 U. S. 727 (1879); *The Union Pacific Railroad Co.* v. *United States*, 99 U. S. 700 (1879).

[2] The fact that the United States Government has not seen fit to move to set aside the invalid transfer apparently reflects an opinion by some representatives of the Executive Branch of the Government, whether or not correct, that the Government's interest has not been seriously affected thereby. Use of the railroad facilities for governmental purposes, regulation of its rates, and regulation of its financing can be assured by general legislation. Application of price restrictions on sales of certain of the lands granted has been made effective against Respondent in the *Land Grant* case. (*United States* v. *Northern Pacific Railway Co.*, 311 U. S. 613 (1940)). On the other hand, however, the rights of Petitioners have been seriously prejudiced by the invalid transfers, indeed, if the decisions below stand, have been for all practical purposes extinguished.

major importance, since they permit the abrogation of a statutory contract, the defeat of an important public policy, and the usurpation of legislative authority by a court.[1]

B.

The doctrine of laches cannot defeat a cause of action founded upon error in a judicial decision induced by a fraud on the court.

Even if the mortgages foreclosed in 1896 had been authorized by the Resolution of 1870, the foreclosure sales to Respondent would have been void for a separate reason, namely, that they were the result of frauds upon the court which decreed such sales, and, accordingly, the alleged laches of Petitioners will not

---

[1] In its brief in the Court of Appeals, pages 43, 44, Respondent sought to maintain the remarkable contention that the question whether the transaction complained of is void or merely voidable is irrelevant to the applicability of the doctrines of laches. For this contention it relied principally upon the case of *Comm'rs. of Leavenworth County* v. *Chicago, R. I. & P. Ry. Co.*, 18 Fed. 209 (W. D. Mo. 1883). It quoted from the lower court's decision to indicate that a court will not inquire as to whether the transaction is void, if complainant has been guilty of laches. It failed to indicate that when that case reached this Court, the Court took the opposite view, determining that the transaction was valid, never reaching the question of laches. *Leavenworth County* v. *Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688 (1890). Indeed, this Court said in that case, "These conclusions make it unnecessary to consider the defenses of the statute of limitations and of laches . . .", 134 U. S., at 710. The cases cited on page 44 of Respondent's brief in the Court of Appeals are inapplicable because of the action of this Court in the *Leavenworth* case. Moreover, none of them involved procurement of a judgment by fraud upon a court or the present and continuing violation of an operative statute. See *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948), cert. den., 335 U. S. 912 (1949), reh. den. 336 U. S. 915 (1949); *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238 (1944), reh. den. 322 U. S. 772.

prevent appropriate judicial action to declare such sales void.

The frauds upon the court referred to are the frauds of misrepresentation to the United States Circuit Court for the Eastern District of Wisconsin of two facts concerning Respondent, on the occasion of the foreclosure sales:

(1) Misrepresentation that Respondent was legally competent to receive the railroad and lands of Railroad; and

(2) Misrepresentation that Respondent was an independent purchaser.[1]

As this Court said in *Stoddard* v. *Chambers,* 43 U. S. 284 (1844), at 318, "Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than the issuing of a (land) patent."

Fraud in the obtaining of a judgment is a basis for reopening the judgment at any time. Nor will delay by private litigants in bringing such a situation to the attention of the courts prevent the courts from taking action. More is at issue than merely the rights of the litigants. The public concern in the integrity of the administration of justice is involved.

See *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.,* 322 U. S. 238, 246 (1944).

---

[1] These, together with fraud in the misrepresentation of the value of Railroad's property to the same court, and fraud in the misrepresentation to Railroad stockholders of the nature and effect of various judicial decisions constitute the only frauds of Respondent alleged in the complaint. (R. 42, 44, 58-62, 69, 70-73) Because of the nature of these frauds, directed, as they were, at the Circuit Court and affecting its action, the mere circumstance that they have been open and known or discoverable does not permit laches to apply.

In *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948) at 522, the Circuit Court of Appeals for the Third Circuit said,

> "The matter is not one of merely private concern subject to the action or inaction of the litigants, but is one of vast public importance, so that *it becomes immaterial that the injured party may have been derelict in bringing the fault to the Court's attention.*" (Emphasis supplied.)

Relief against such fraud is not restricted to the court in which the fraud is practiced. If a court finds that a decree or judgment, even though made by another court, was obtained by fraud, it will deprive the guilty party of any benefit derived by him thereunder. *Johnson* v. *Waters*, 111 U. S. 640 (1884).

In the *Johnson* case, the Court held that the United States Circuit Court had jurisdiction to set aside a decree of a state court because of fraud in the obtaining thereof. After stating the general rule concerning the finality of judgments, the Court, in 111 U. S., at 667, stated:

> "... But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. *The Court of Chancery is always open to hear complaints against it, whether committed in pais, or in or by means of judicial proceedings.* In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; *but it will scrutinize the*

conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it." (Citing authorities.) (Emphasis supplied.)

Nor is standing to seek relief against such fraud restricted to a party to the proceeding in which the fraud was practiced. Thus in *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F. (2d) 514 (C. C. A. 3d, 1948), the remedy for the fraud was sought and obtained at the instance of applicants, who had not been parties to the fraud-tainted proceeding, but against whom the decision in the proceeding was being used as a precedent.

Railway, as a Wisconsin railroad corporation, was prohibited by Wisconsin law in 1896 from acquiring any part of any other railroad unless the respective railroads could be lawfully connected to constitute one continuous line. Wisconsin Revised Statutes, (Appendix B, p. 36a.) Railway, prior to the foreclosure sales, had no railroad, and therefore none which could be connected with that of Railroad to form a "continuous line". Twelve days before the purchase at foreclosure, as set forth in a statement dated July 13, 1896, and sworn to by a majority of its board of directors for filing in the State of Montana, Railway had no assets except $4100 in cash, stocks, bonds and securities of Northern Pacific Railroad Company. (R. 7, 174, 196, See 236.)

Railway was also prohibited by the applicable laws of six states at the time of the foreclosure sales in 1896 (and also in 1899 when lands in Minnesota and North

Dakota were sold) from owning, holding, or using lands in such states not necessary for railroad operation purposes.

Wisconsin: Statutes 1889, sec. 1828.
Minnesota: Statutes 1894, sec. 5877.
North Dakota: Revised Codes 1895, sec. 2497.
Montana: Codes 1895—Title VIII, sec. 894.
Idaho: Revised Statutes 1887, sec. 2666.
Oregon: Hill's Annotated Codes and Laws 1887, Vol. 2, sec. 3321.

Yet, at the same time, in the petitions filed by Respondent with the Circuit Court for decrees confirming the sales to Respondent, as disclosed in the court's decree dated July 27, 1896, (confirming the sale of the railroad, franchise, and right of way), in the court's decree dated August 8, 1896 (confirming sales of lands in the land grant, except lands east of the Missouri), and in the court's decree dated September 16, 1899 (confirming sales of land in the land grant in Minnesota and North Dakota), Respondent falsely and fraudulently alleged that it had complied with all the requirements of law of the States of Wisconsin, Minnesota, North Dakota, Montana, Idaho, and Oregon so as to enable it to transact business and to hold property, real and personal, in each such state.[1]

These allegations were false and fraudulent as to acquisition of connecting railroad in Wisconsin and as to the acquisition of the federal land grant in all of those states.

---

[1] The texts of the decrees referred to are given in hearings before the Joint Congressional Committee for the Investigation of the Northern Pacific Railroad Company Land Grants, 68th Congress (hereafter called "JCC Hearings") at pp. 1431, 1439, 1479.

Furthermore, paragraph VII of Petitioners' complaint (R. 6-11) alleges that on or about July 13, 1896 (which was 12 days before the sale at foreclosure) Respondent acquired "most of the bonds and more than 90% of the capital stock of the Northern Pacific Railroad Company." This allegation must, for the purposes of Respondent's motion for summary judgment, be taken as true. Moreover, it is not denied, but rather confirmed, by paragraph VII of Respondent's answer. (R. 81-88.) At the date of the sales in 1896, therefore, Respondent purchaser completely dominated the Railroad seller. The sales were, in effect, transactions between Respondent and itself. (R. 10, 42, 60.)

Respondent, however, represented itself to the Circuit Court as an "independent" purchaser. (Complaint LVI, R. 41, 42.)

The fraud on the Circuit Court involved in the false allegations of Respondent as to competency to acquire the railroad, its competency to acquire the lands, and its status as an independent purchaser, of Railroad, related to material facts and affected the action of the court.

Obviously the court would not have confirmed sales to an entity which it knew was not competent to own the property purchased. And obviously the court, in view of the absence of an independent appraisal, would have undertaken to examine independently and with care the fairness of the terms of the foreclosure sales if it had known that the purchaser was not a bona fide independent entity. *First National Bank of Cincinnati* v. *Flershem*, 290 U. S. 504 (1934).[1]

---

[1] In its brief in the Court of Appeals, Respondent attempted to take the position that invalidity of the transaction, whether due to statutory violation or fraud, does not affect the applicability of the doctrine of laches. See p. 27, note 1, above.

C.

Laches is not present under such circumstances as exist in this case in that: (1) There has been no lack of diligence; (2) There has been no inexcusable delay; and (3) In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting the present case.

The elements necessary to establish laches are familiar. Passage of time by itself does not constitute laches. *Gardner* v. *Panama Railroad,* 342 U. S. 29 (1951). There must have been lack of diligence, inexcusable delay, and damage or prejudice to the Respondent because of such lack of diligence and inexcusable delay. These elements must be proved as matters of fact.

Southern Pacific Co. v. *Bogert,* 250 U. S. 483, 488-490 (1919).
Shaffer v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946).

1. *There has been no lack of diligence.*

Respondent admits diligence on the part of the Petitioners but contends such diligence has not been exercised before the proper forum. This contention ignores the rule that diligence can be established by proof of the pursuit of remedies other than litigation. When other remedies are continuously sought, failure to institute litigation is no reason to apply the doctrine of laches. *Shaffer* v. *Rector Well Equipment Co.,* 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Judge Tamm appears to regard as a "novel point" (Appendix A, p. 12a) the contention that Petitioners' continuous pursuit of administrative and legislative remedies establishes that Petitioners have not been guilty of lack of diligence. In view of the fact that Petitioners are parties to a federal statutory contract by invitation of Congress, it would seem that pursuit of such remedies was reasonable and proper and con-

sistent with the rule laid down in the *Shaffer* case, *supra,* that continuous pursuit of non-judicial remedies constitutes diligence. Nevertheless, if Judge Tamm is right in considering that this application of the general rule raises a novel point, this would appear, in itself, to be a matter calling for the decision of this Court and, therefore, one which should require the grant of certiorari.

It would further seem that the decision of what he considered a novel point, which was necessarily involved in Judge Tamm's grant of Respondent's motion, should not have been made upon motion for summary judgment. See p. 50 below.

For more than fifty years Petitioners and their predecessors have protested in various forms the illegality of Respondent's acquisition of the estate of the federal corporation. Such protests have been and are being made at stockholders' meetings, to the Departments of Justice and Interior, Interstate Commerce Commission and Congressional Committees, and elsewhere.

In its Answer (pp. 2-3), Respondent admits the truth of the foregoing statement, and alleges (in part accurately and in part inaccurately) that:

> ". . . plaintiff's claims have been presented to and rejected by the Interior Department of the United States, two Attorneys General, various committees of Congress, and various courts."

In the present case the original opinion of Judge McLaughlin in the District Court recognizes that Petitioners have always persisted in their claim whereas in the *Bogert* case, *supra,* where the plea of laches was overruled, the minority holders had for a time acquiesced in the reorganization plan. This appears in Judge McLaughlin's opinion as follows:

"It would appear that the relief sought by plaintiffs in the instant case is essentially similar to that sought in the Bogert case and that the rule announced in the Bogert case should, a fortiori, apply herein, since in this case plaintiffs, or their predecessors, have always persisted in the claim that the reorganization was invalid and that the transfer of assets to the majority stockholders was illegal, whereas in the Bogert case the minority holders had for a time acquiesced in the reorganization plan." (Appendix A, p. 5a).

2. *There has been no inexcusable delay.*

As pleaded in the complaint (R. 72) Respondent procured a deficiency judgment in its favor against the federal corporation and "advises minority stockholders . . . that their shares . . . are worthless because [the federal corporation] is bankrupt and that defendant holds a judgment against said federal corporation in excess of $100,000,000." Respondent's own fraudulent action in obtaining the deficiency judgment (R. 72) and using it to hinder and prevent the minority from undertaking costly litigation has been one of the largest contributing factors in deterring institution of litigation.

Respondent has also conducted a propaganda campaign to convince the minority stockholders that the foreclosure decrees of the Circuit Court and the decisions of this Court have conclusively adjudicated, and that the Attorney General has ruled, that Respondent is the lawful successor to the franchises and property of the federal corporation. (R. 61, 105, 106, 119, 189, 264; See Respondent's Brief in the Court of Appeals, pp. 5, 12, and 18; Petitioners' Reply Brief in the Court of Appeals, pp. 8-10.)

These actions on the part of Respondent were successful in discouraging financial support for necessarily costly litigation until other avenues of possible relief, administrative and legislative, had been explored and found to be, at least up to the present time, ineffectual.

Having deliberately caused the delay in resort to litigation, Respondent is in no position to complain of that delay.

In upholding the defense of laches, Judge Tamm's opinion (R. 125, 128) relies upon the 1939 unreported opinion and decision of Judge Hulbert in the case of *Joseph Hoover* v. *Northern Pacific Railway Company et al.,* (U. S. D. Ct., So. D. N. Y.) which dismissed the complaint in that case (to which Petitioners were not parties) for inexcusable delay in its prosecution. (R. 165.) The per curiam Court of Appeals opinion in footnote 2 thereof (R. 558) cites the *Hoover* case and states that it was allowed to die for want of prosecution in 1939 and a motion to reinstate it was denied for inexcusable laches.

The facts as admitted are that Hoover was *not,* as pleaded in the Answer (R. 115), a dissenting shareholder in 1896—he was a concurring and participating shareholder. (R. 252.) No decision in a suit on his complaint should, therefore, have any relevance to the present case. *Arnstein* v. *Porter,* 154 F. (2d) 464, 474-5 (C. C. A. 2d, 1948).

The action commenced by Hoover in 1900 abated in 1904 because, it was then known to all parties to the suit that Hoover had no standing as party plaintiff. In 1939 after the Hoover suit had in 1918 been marked off the calendar for failure to answer the call, substitute counsel for the executor of deceased Hoover made

a motion to reinstate the *Hoover* case on the calendar. No reason was offered for the 35 year delay in prosecution except the obviously flimsy one of missing papers. (R. 172.) The attorneys for Hoover's executor in 1939 were at that time attorneys for Petitioner committee herein. They were dismissed before the institution of the present proceeding. (R. 194, 562.)

In 1938-1939 when the motion to reinstate was made and dismissed for inexcusable delay, there was then in possession of both parties to the motion, documentary proof that Hoover had no status to prosecute his action as a dissenter. These documents included a letter from Railway's counsel and an Exhibit offered by Railway at the Hearings before the Joint Congressional Committee to Investigate the Northern Pacific Land Grants. (R. 252, 256.) Neither party to the Hoover suit motion in 1939 disclosed to Judge Hulbert the existence of these material documents then in their possession. If the Judge had known the real reason for the abatement of the Hoover suit in 1904 was because of Hoover's lack of standing as party plaintiff he could not have determined that there had been inexcusable delay in the prosecution of the suit. It was grave error for the courts below, after being fully informed of the circumstances attending the 1939 *Hoover* case opinion,[1] to use it against the Petitioners.

---

[1] Point II of Petitioners' Points and Authorities filed in the District Court reads as follows: "The use in the present case of the 1939 decision and opinion in the *Hoover* suit as a determination of inexcusable laches should bar defendant from the aid of a court of equity. Such decision and opinion was obtained by suppression of pertinent evidence on the most material question in that case." See Petitioners' Brief in Court of Appeals, pp. 16, 38; reply brief, pp. 5, 10.

3. *In any event, Respondent has not suffered any damage or prejudice because of lack of diligence or because of inexcusable delay in instituting the present case.*

Respondent must prove not only that it has suffered damage or prejudice, but also that such damage or prejudice was caused by the lack of diligence of Petitioners or their inexcusable delay in instituting litigation. The burden of proof in these respects is on Respondent.

> *Shaffer* v. *Rector Well Equipment Co.*, 155 F. (2d) 344, 346-347 (C. C. A. 5th, 1946).

Respondent will not be prejudiced through the unavailability of witnesses due to the passage of time. This case can be decided upon authenticated documents now in existence and available and upon proof of current happenings. (R. 5.)

The claimed lack of diligence and inexcusable delay in instituting this suit have not lulled Respondent into action prejudicial to itself. Respondent, in an earlier case, has advised the Supreme Court that Petitioners' rights to sue were not and could not be prejudiced by the very judgment Respondent now urges as a bar to Petitioners' relief in this case. (R. 69, 70). Certain of the minority stockholders attempted to intervene in the case of *United States* v. *Northern Pacific Railway Co.*, 311 U. S. 317 (1940) (the "Land Grant case"). Their attempt, as shown in the Lishman Affidavit (R. 190-192), was opposed by the Government, by Railway, and by Railroad on the ground that the attempted intervention was seven years after the commencement of the Government's suit and that the Government's bill of

complaint did not contemplate litigation of claims by stockholders. (R. 191.) The lower courts, in denying the attempted intervention, did so without prejudice and reserved the right in the attempted intervenors to assert their claims in any other proceeding. When these attempted intervenors sought to have the Supreme Court reverse the lower court in *Northern Pacific R. R. Co. by Schmidt* v. *United States,* 308 U. S. 508 (1939) defendants Railway and Railroad filed a joint brief in the Supreme Court stating that the minority stockholders had not been and could not be prejudiced by the judgment denying their right to intervene. The joint brief, at page 4, stated:

> "We repeat here the statement often made in our brief opposing the petition for certiorari, that these parties(the minority stockholders) *have not been and cannot be prejudiced by the judgment entered below.* As shown in their petition for appeal, the order of the District Court denying leave to intervene, affirmed by the Court of Appeals, expressly provides that the contentions of these parties, as minority stockholders of the Northern Pacific Railroad Company, shall be in no way prejudiced by the proceedings and judgment in this case. *Their right to sue as minority stockholders is as good now as it ever was.*" (Emphasis supplied.)

It is a matter of public record that Respondent has conducted its affairs in such a way as to suggest its recognition of the fact that its title to the Northern Pacific Railroad Company properties might ultimately be held to be defective. As has been stated, the foreclosure decrees did not dispose of the issue raised in the proceedings that the mortgages were void, and this issue has not been determined. The conveyances

of record to Respondent all contain specific references to the reservation. (R. 22.)

All of the mortgages placed by Railway on the properties of the federal corporation and filed with the Interstate Commerce Commission under the Interstate Commerce Act (49 U. S. C., Sec. 20a) contain extremely unusual escape clauses. These are provisions authorizing Respondent, without the consent of the mortgage trustees, to convey and transfer to a railroad corporation, organized and existing under the laws of the United States, all the property purported to be covered by the mortgage, subject to the continuing lien of the indenture. (R. 43, 179.)

These provisions show that Respondent has kept itself in a state of readiness to transfer the railroad back to the federal corporation with a minimum of complication. (R. 43, 5, 69.)

Respondent's only showing of damage or prejudice is based on its claim that to permit the minority stockholders to recover would mean depriving it, as holder of 97% of Railroad's stock, of some part of the benefits and advantages derived from its unlawful exploitation of the federal corporation. This is not the kind of damage or prejudice that a court of equity will recognize in applying the doctrine of laches. It is not a change of position induced by reliance upon lack of diligence or inexcusable delay of Petitioners in instituting litigation.

In *Shaffer* v. *Rector Well Equipment Co.*, 155 F. (2d) 344 (C. C. A. 5th, 1946), the defendant had for more than eight years infringed plaintiffs' patents. The plaintiffs had continuously, by means other than litigation, sought to dissuade the defendant from con-

tinuing its patent infringement. In the District Court the defendant was successful in urging that, because of its change in position by reason of enlarging the exploitation of its illegal patent use, the plaintiffs were barred by laches. The Circuit Court of Appeals, however, held that such change of position afforded no reason for the application of the doctrine and reversed. In making such determination the Court of Appeals said, at page 347:

> "* * * the expansion of a business from the profits reaped by infringement is not a prejudicial change of conditions so as to authorize the defending infringer to invoke the defense of laches against a patent owner who has forborne to hale him into Court, meanwhile attempting to settle his claims amicably. Repeated wilful trespasses confer no right to continue them. Stearns-Roger Manufacturing Co. v. Brown, 8 Cir., 114 F. 939; Imperial Chemical Manufacturing Co. v. Stein, C. C. N. Y. 69 F. 616."

Respondent claims that the position of Respondent and its stockholders has changed, that the value of the properties has materially increased since 1896, and that in and around the year 1896 Respondent's shares and the shares of the federal corporation had little value. The moving affidavit in support of these contentions refers to 1896 and 1897 stock quotations. (R. 285, 286.) A complete answer to that contention is found in the fact that in *Northern Pac. Ry. Co.* v. *Boyd,* 177 Fed. 804, at 817 (C. C. A. 9th, 1910), aff'd, 228 U. S. 482 (1913), the same evidence was ruled non-probative.

The record herein establishes that Respondent has suffered no prejudice or detriment by reason of the claimed delay in instituting litigation. The record shows that the Respondent has secured to itself tre-

mendous benefits and advantages from its exploitation of property which rightfully belongs *pro rata* to the Petitioners herein.

II. EVEN IF IT SHOULD BE HELD THAT LACHES BARS RECOVERY FOR PAST DAMAGE, THE DISTRICT COURT ERRED IN REFUSING TO PROTECT PETITIONERS' EXISTING AND CONTINUING RIGHTS UNDER THE ACT OF JULY 2, 1864, IN THE RAILROAD AND TELEGRAPH FRANCHISES AND RIGHT OF WAY, WHICH, IN ANY EVENT, RESPONDENT WAS NOT COMPETENT TO ACQUIRE.

The suit here has two distinct features: First, it is an action by Petitioners, 3% stockholders in Railroad, to obtain an accounting for past damages. Since 1896 they have received no share of the dividends or earnings from the operation of the railroad. All profits have been retained by Railway, the 97% stockholder. (R. 75, 76.)

Second, and this is the phase to be stressed here. Petitioners seek to undo the violation of their existing and continuing present and future rights in railroad and telegraph franchises and right of way granted to the Northern Pacific Railroad Company. (R. 33, 38.) They seek to prevent the Respondent from continuing to violate this law and their rights and to have restored to the Northern Pacific Railroad Company those franchises and right of way which it alone can lawfully hold as property under the Act of July 2, 1864.

Judge Tamm, in his erroneous disposal of this complicated lawsuit on a motion for summary judgment (See Point III below), failed to treat and take into account this alternative theory of Petitioners' case. His opinion deals only with the application of the doctrine of laches to claims for past damages from 1896 to the date of the filing of the suit. At no point did he distinguish between these claims for past damages

and Petitioners' right to equity protection against current and future violations of their existing statutory contract rights. Moreover, he paid no attention to the franchise question.

Judge McLaughlin, however, in his opinion denying the earlier motion to dismiss, properly distinguished between the two theories of Petitioners' case. (Appendix A, p. 1a.)

A. The complaint and prayer for relief spell out the case for intervention of equity to protect Petitioners' existing and continuing rights as shareholders in the franchises and right of way granted to an existing corporation by the Act of July 2, 1864.

Paragraph X of the complaint (R. 11) refers to Section 2 of the Act of July 2, 1864 (13 Stat. 365), which grants a right of way in perpetuity to the Northern Pacific Railroad Company, a federal instrumentality. It also shows that "the right of way shall be exempt from taxation within the territories of the United States."

Paragraph IX of the complaint shows the grant of the railroad and telegraph franchises in Section 1 of the Act of July 2, 1864, to the stockholders as members of a federal body politic and corporate.

At several places the complaint develops Petitioners' alternative cause of action, namely, the right to protection from present and future violations of the law damaging their existing and continuing rights of property in these franchises and right of way.

Paragraph LII asserts that "the franchises and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864, are inalienable without legislative authorization by the Congress of the United States and the purported sales of same

to defendant without such legislative authorization and under the guise of said consent decree and order of 1896 are void and of no effect in divesting said franchises and right-of-way and transferring same to defendant." (R. 33.)[1] See *U. S.* v. *Northern Pacific Railroad Co.*, 95 F. 864, 876-7 (CCA 8th, 1899.) It also asserts that Respondent's illegal possession and control of the franchises and right of way under these void decrees "have wrongfully deprived, *and are so depriving,* the Plaintiffs and others similarly situated of property to which they are entitled under the Constitution of the United States and under the said Act of July 2, 1864." (Emphasis supplied. See Lishman Affid. R. 175, 185.)

Paragraph LV, subparagraph (F) states that "By such claim and enjoyment of the franchises and right-of-way granted to the Northern Pacific Railroad Company, Defendant has deprived *and is depriving the Plaintiffs,* of their property without due process of law." (R. 38. Emphasis supplied.) See also paragraph LXXXII, subparagraph (D), of the complaint (R. 75.)

In support of this cause of action Petitioners pleaded the following facts and circumstances.

---

[1] Appraisal of the correctness of Judge Tamm's refusal to protect Petitioners' existing statutory rights should take into account the Act of June 25, 1929 (46 Stat. 41), which authorized institution of the *Land Grant* case, 311 U. S. 317 (1940). In section 4 of that Act, Congress provided that nothing in the Act should affect "the present title" of Railroad to the road and gave Railway protection only with respect to "road or land actually used in good faith * * * in the operation of said road." The allegations in Petitioners' complaint charge that Railway's operation is not in good faith. (See Appendix B, p. 36a.)

First, paragraph VII (R. 9), states that the foreclosure decree relied upon by Respondent for its title to the railroad, franchises and right of way of the federal corporation expressly reserves the question of the validity of the mortgages being foreclosed.

Paragraph XXXIX (R. 20-22), states that on March 2, 1896, the Wisconsin Central Company, the Wisconsin Central Railroad Company, and their Receivers intervened in the foreclosure proceedings, alleging that the mortgages were expressly forbidden by the charter of the Northern Pacific Railroad Company (R. 209) and that the same were invalid. It is also shown that the court signed the foreclosure decree without disposing of this issue and the decree expressly directs that the sale of the railroad, franchises, and right of way should be made subject to the reservation of the issue thus raised. It was further shown that this issue has never been determined. (R. 22.)

It was further pleaded, as is the case, that the claims, issues and equities so reserved have never been determined. (R. 21.)

Second, the complaint also shows that, despite the efforts of Respondent to secure Congressional sanction for the transfer to it of rights to these franchises and right of way, "the Congress of the United States has refused to authorize or accept the defendant, Northern Pacific Railway Company, as the legal successor to the Northern Pacific Railroad Company and has refused to sanction the transfer of such railroad company's franchise and property to the defendant, and no such authorization, acceptance or sanction has ever been made." (For detailed recital of legislative refusals to sanction the transfer of the rights, the franchise and powers of the Northern Pacific Railroad

Company, see Paragraph LIV of the complaint. (R. 35, see Lishman Affid. R. 178, 183-185, 215-236.)

The record also shows that no court has considered or determined that there has been a lawful transfer to the Respondent of the railroad, franchises and right of way granted by Congress to the federal corporation. In *United States* v. *Northern Pacific Railway Company,* 311 U. S. 317 (1940), known as the "Land Grant case", the validity of the transfer of the railroad franchises and right of way was not decided by this Court.[1] Statements in several opinions of this Court that Respondent is the successor of the federal corporation, although attempted to be used by Respondent as *res judicata* on the title question (see, Petitioners' reply brief in the Court of Appeals, pp. 6, 8-9), are not adjudication of this question. In all of these cases the pleadings removed the issue of successorship. The Government's bills of complaint alleged that Respondent had succeeded to Railroad and all its property and franchises. The answers of Respondent and of its captive, Railroad, for obvious reasons, *admitted* the truth of the erroneous Government allegations. (R. 189.)

Third, the complaint further alleges certain courses of corporate conduct by Respondent which serve as recognition of the questionable character of Respondent's right to hold these franchises and right of way. In all of its mortgages purporting to cover properties owned by the Northern Pacific Railroad Company, Respondent has made provision that without consent of the mortgage trustee the mortgaged properties can

---

[1] In the *Land Grant* case, 311 U. S. at 342, this Court reserved decision on the allegation in the government's bill of complaint that the 1896 reorganization was fraudulent and collusive.

at any time be transferred to a railroad corporation organized and existing under the laws of the United States. (R. 42, 43.) The only corporation so organized and existing and capable of being such transferee is the Northern Pacific Railroad Company (R. 10-11, 42, 43, 179.)

Further, it was pleaded that "Defendant, holding more than 90 per cent of the capital stock of the Northern Pacific Railroad Company, has kept said company alive and captive since 1896 to do its bidding and to be available as a railroad corporation organized and existing under the laws of the United States, capable of succeeding to the property purported to be mortgaged by Defendant, and, in the meantime, to secure to Defendant for its own personal use and profit, and to the injury of Plaintiffs, the great advantages of the franchises, railroad and telegraph line, and right-of-way, with its said privilege of tax exemption, granted by Congress exclusively to said Northern Pacific Railroad Company" (R. 43-44.)

B. In any event, Respondent had no capacity to take and operate the railroad, franchises and right of way provided in the Act of July 2, 1864.

The Complaint (paragraph LIX, R. 44) alleges: "The Northern Pacific Railroad Company by consent decree or otherwise was incompetent to transfer its railroad, franchises, right-of-way and other property and rights to property to defendant, and defendant was and is incompetent to take and hold same." (See R. 70.)

Certain law and facts further indicate the background of this allegation.

This Court in *Northern Pac. Ry. Co.* v. *Boyd,* 228 U. S. 482, 502 (1913), determined that the consent decree under which Respondent claims is no different than a private assignment from Railroad to Respondent.

Respondent's witnesses, Mr. Morawetz and Mr. Britten, testified before the House Judiciary Committee in 1896 that it would be impossible for the transcontinental main line of railroad and telegraph to be transferred to Respondent unless Congress authorized same. (R. 184.)

Senator Mitchell, reporting for the Committee on the Judiciary on H. Res. 124 (Cong. Rec., 54th Cong., 1st sess., p. 6139), stated that Respondent had applied to Congress "for the grant of a franchise, to be a corporation, and to exercise all the functions of a national corporation, which they cannot exercise at all unless in pursuance of an act of Congress."[1]

This Court in *Oregon Ry. and Nav. Co.* v. *The Oregonian Ry. Co.,* 130 U. S. 1 (1889), determined that the words "successors and assigns" in a statutory grant do not confer authority upon the grantee to transfer the road and the exercise of its franchises. See *Louisville & Nashville Railroad Co.* v. *Kentucky,* 161 U. S. 677 (1896); Elliott on Railroads, 3rd ed., sec. 79.

This Court in *Roberts* v. *Northern Pacific Railroad Co.,* 158 U. S. 1 (1895), expounded the overrid-

---

[1] Fletcher on Corporations (Permanent Ed. 1931), vol. 7, sec. 3343, states: "As a rule the purchaser at a foreclosure sale acquires the franchises of the corporation but not the right to exercise them without taking out a new charter." Respondent in 1896, prior to the foreclosure sale, applied to Congress for charter authorization (R. 35, 178, 215-236).

ing importance of the Northern Pacific Railroad Company as a federal instrumentality whose powers and duties of management and control could not be changed either by the Legislature or courts of Wisconsin. Respondent, we submit, by means of a private assignment in the form of a consent decree, could not thereby validate its claimed capacity to succeed to a modified version of the federal corporation's operating franchises and right of way.

Petitioners asked in their prayer for relief (R. 75):

> "That it be adjudged and decreed that the Defendant, Northern Pacific Railway Company, has no right, title or interest in or to the franchises, railroad and right-of-way granted to the Northern Pacific Railroad Company under the Act of July 2, 1864 (13 Stat. 365), and the Joint Resolution of May 31, 1870 (16 Stat. 378), except as holder of the majority of the capital stock and the bonds of said federal corporation, and that title to same is in the Northern Pacific Railroad Company."

Respondent keeps alive the Northern Pacific Railroad Company and its 97% stock interest therein, which it holds as "muniments of title" to the federal corporation's franchises, rights and property (R. 181-183, 246), while asserting that Petitioners' 3% stock in the federal corporation is valueless, and is excluded from the present and continuing benefits of the franchises and property.[1]

There is no basis in fact or law for adjudging that Petitioners continued and uninterrupted 3% stock ownership can be nullified by laches, while Respondent's 97% stock ownership may still continue to be

---

[1] See discussions of that point in Petitioners' Petition for Rehearing before Court of Appeals, Appendix D, Point II.

used by it to dominate the federal corporation. It was manifest error to disregard the complaint and its prayer asking judgment that Respondent has no greater present interest in the franchises and property of the federal corporation than is represented by its 97% stockholding therein. See *U. S.* v. *Northern Pacific Railroad Company,* 95 F. 864, 876-7 (CCA 8th, 1899).

C. The cases require the intervention of equity to protect continuing and existing rights from future violation of the law creating those rights, despite the applicability of equitable defenses, such as laches and estoppel, to attempts to recover for past violations.

Petitioners have contended heretofore (see Point I, *supra*) that the courts below erred in holding laches to be a bar to Petitioners' complaint in its entirety, asserting various contentions arising out of the statutory background of the violation and the facts concerning the absence of the necessary elements of laches. Petitioners now assert that, whatever may be the applicability of laches to recovery for past wrongs, laches is no defense to a suit to correct a present illegality and to prevent future violations.

A line of cases dealing primarily with rights in the ownership and operation of railroad property support this position. *Pennsylvania R. R. Co.* v. *St. Louis, etc., R. R. Co.,* 118 U. S. 290 (1886); *Central Transportation Co.* v. *Pullman's Palace Car Co.,* 139 U. S. 24 (1891); *United States* v. *Southern Pacific Co.,* 259 U. S. 214, 234 (1922); *Cf. Texas & Pac. R. Co.* v. *Pottorff,* 291 U. S. 245 (1934).

In the *Pennsylvania Railroad Company* case (118 U. S. 290) plaintiff secured an injunction on a bill in equity involving a lease by one railroad to another

of its road and franchise. It was held that the lease was void because neither company had power to enter into it and that a guaranty of the obligations of the lease was also void. But it was contended in the Supreme Court that "though the contract of lease may be void, so that no action could originally have been sustained upon it, there has been for ten years such performance of it, in the use, possession and control of plaintiff's road and its franchises by the defendants, that they cannot now be permitted to repudiate or abandon it." It was further argued that the situation presented one of a class of cases which hold that "where a void contract has been so far executed that property has passed under it and rights have been acquired under it, the courts will not disturb the possession of such property or compel restitution of money received under such a contract." (118 U. S., at 316) The Supreme Court rejected this contention, stating:

> "But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands. We know of no well-considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract, and refuses to proceed further, it can be compelled to do so." (118 U. S., at 317.)

The *Central Transportation Company* case was an action to recover a sum due on a lease by the plaintiff of its property to the defendant. The defense was

that the lease sued on was void in law because *ultra vires* the powers of each of the corporations by and between whom it was made. It was argued on behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that having been fully performed on the part of the plaintiff and the benefits of it received by the defendant for a long period, the defendant was estopped to set up the invalidity of the contract as a defense. In rejecting the contention of estoppel the court followed the doctrine of the *Pennsylvania Railroad* case noted above. This case is of interest because it states clearly the doctrine applicable in the present situation, where the Northern Pacific Railroad Company, acting under the control of 97 per cent of its stockholders, disposed of its property in violation of the charter powers conferred upon it. The opinion in this respect reads as follows:

> "The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

"When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws." (139 U. S., at page 60.)

This Court has also determined that railroads have such continuing rights to the lands in their right of way that neither the doctrine of laches nor of adverse possession has any standing to bar them from asserting their paramount continuing right. *Great Northern Railway Company* v. *Steinke,* 261 U. S. 119 (1923); see also *Northern Pacific Railway Company* v. *Townsend,* 190 U. S. 267 (1903).

Perhaps the clearest line of cases on the proposition that laches does not shut off the right to protect continuing rights from future violations, is that involving patent and trademark infringement (see *Shaffer* v. *Rector Well Equipment Co.,* 155 F. (2d) 344 (C. C. A. 5th, 1946); *Menendez* v. *Holt,* 128 U. S. 514 (1888); *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403 (1916)).

In *Menendez* v. *Holt,* plaintiffs, asserting certain trademark rights, which had been and were being violated by defendants, sought an accounting for past damages and a decree entitling them to exclusive use of the trademark in question. The lower court refused the accounting but found that the defendants had in-

fringed the rights of complainants and decreed a perpetual injunction. On appeal, this Court considered at length the contention that whatever rights plaintiffs may have had were lost by laches, because of its long delay over a period of years in instituting the suit. Mr. Chief Justice Fuller, in his opinion, said:

> "So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it; but so far as the act is in progress, and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise." (128 U. S., at 524)

This principle of affording protection to trademark rights in the future through injunctive relief, while denying an accounting for profits for past infringement, was followed in the *Hanover Star Milling Co.* case, *supra.* In *Shaffer* v. *Rector Well Equipment Co., supra,* the same principle was applied in a patent infringement case. The opinion noted that:

> "The company not only sought an accounting for damages, but it sought an injunction to prevent further infringement, which called for a determination of the validity of the patents and whether or not plaintiffs were entitled to prohibit further alleged infringement. Even if laches had been shown and deemed to be a defense against accounting for damages that had accrued in the past, it does not follow that this should deprive the plaintiffs of a right to an injunction, if their patents were valid and had been infringed." (155 F. (2d), at 347.)

* * * * *

From the foregoing cases, it would seem that Judge Tamm, even if he were correct in entertaining a defense of laches to Petitioners' efforts to recover on an accounting, relating to the past, was guilty of error and a failure to do equity in refusing to consider the other theory of Petitioners' complaint; namely, their right to have adjudged the important current and future public question of whether the franchises and right of way in question are now lawfully retained in the ownership and possession of the Northern Pacific Railway Company. Whatever equitable defense may arise out of Petitioners' failure to go into a court to seek relief while they were continuously and repeatedly seeking legislative and administrative redress, clearly equity demanded a determination of the long reserved question as to whether or not the franchise and right of way were validly transferred. This is particularly true because of the fact that Congress both before and after the foreclosure decree has refused to authorize Railway's succession to the franchises and right of way.

Judge Tamm erred in not taking into account the deliberate course of conduct followed by the Respondent to maintain a corporate position which would enable it to abide by a decree adjudging the rights in the franchises and rights of way to be in the Northern Pacific Railroad Company. This course of action was well pleaded. If these allegations had been accepted for the purposes of Rule 56 they would establish that a judgment in conformity with the second paragraph of the plaintiff's prayer could work no serious inequity upon either the Respondent or upon any third persons.

Judge Tamm's refusal to accept or even to consider the carefully pleaded allegations in the complaint sub-

stantiating the separate basis for relief and the Court of Appeals' sanction thereof is so far a departure from the accepted and usual course of judicial proceedings as to call most urgently for the exercise of this Court's power of supervision.

A sharp distinction should be drawn between the present situation and one where a suit to restore property rights is purely private in nature. In this case, the proper judgment and determination of ownership, along the lines prayed for in paragraph 2 of Petitioners' prayer, will serve not only their private purpose in retaining those rights in a corporate ownership, where they will benefit from their future enjoyment, but also a public purpose of effectuating the public law and will of Congress, as expressed in the Act of July 2, 1864.

III. THE DECISIONS BELOW, CONTRARY TO THE APPLICABLE DECIDED CASES, HAVE USED, AND SANCTIONED THE USE OF, SUMMARY JUDGMENT PROCEDURE TO DETERMINE A COMPLICATED CASE INVOLVING IMPORTANT PUBLIC ISSUES.

A reading of the record and the extensive briefs filed in this action in the District Court or even in the Court of Appeals will be sufficient to show that it was erroneous to employ summary judgment procedure to decide the case at bar. Highly complicated issues concerning important public questions, and questions of the validity of court decrees, the effect of reservations in decrees, the true administration of justice, and the rights of citizens under a statutory contract are inseparably involved in the laches determination.

Our discussion in Points I and II indicates the complicated nature of the case, even on the narrow base of the decision below that the doctrine of laches barred

relief. Our discussion also specifies some of the important public issues involved, *e.g.*,

(1) Whether the doctrine of laches is applicable to the continuing deprivation of existing private property rights (stockholder interest in an existing corporation) by a present and continuing violation of a federal law. (Act of July 2, 1864, 13 Stat. 365 and Joint Resolution of May 31, 1870, 16 Stat. 370.)

(2) Whether resort to legislative and executive relief prevents the claim that laches bars prosecution of judicial proceedings.

This proceeding involves more than the question of Petitioners' property rights. In addition to the questions of public importance already indicated is the one as to whether the federal government has any responsibility to protect the rights of persons who accepted its invitation to invest in a railroad property set up in the manner and for the purposes described in the Act of July 2, 1864. By the very nature of the issues involved, this case is not susceptible of, and should not be decided by summary adjudication. Without careful and orderly analysis of the numerous statutes and documents involved and determination of the issues arising from them, at the trial court level, there is no adequate basis for appellate review. The District Court failed to analyze the statutes and documents and to determine important public and private issues which were before it. In so doing it violated the principles enunciated in *Arenas* v. *United States*, 322 U. S. 419 (1944); *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948); *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249 (1948); *Palmer* v. *Chamberlin*, 191 F. (2d) 532 (C. C. A. 5th, 1951).

In *Kennedy* v. *Silas Mason Co., supra,* Mr. Justice Jackson stated the governing standard of trial court action which should have been applied in the present case, saying:

> "The short of the matter is that we have an extremely important question . . . The case . . . comes to us almost in the status in which it should come to a trial court. In addition to the welter of new contentions and statutory provisions we must pick our way among over a score of technical contracts, each amending some earlier one, without full background knowledge of the dealings of the parties. The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties, and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of 9. . . .
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." 334 U. S. 249, 256-257.

The departure from this doctrine has led in the instant case to summary adjudication that does justice neither to the legal issues involved nor to the party against whom the judgment is rendered.

In deciding that the Petitioners' entire cause was barred by laches, by reason of the passage of time from the date of the initial invasion of those rights by the consent mortgage foreclosure of 1896, the trial court ignored a basic contention of the Petitioners (see Point II, *supra*). Petitioners asserted rights in property vested in them under the Act of July 2, 1864, which the Respondents not only violated in 1896 and in each succeeding year thereafter, but are currently and continuingly violating. These property rights and claims were expressly reserved in the final decree of foreclosure and sale of the Circuit Court of the United States for the Eastern District of Wisconsin under which the Respondent claimed successorship (see Complaint, paragraphs XXXIX, LII and paragraph 2 of the prayer for relief; R. 21, 33, 75; also Lishman Affid. R. 189, 192).

It is one thing to rule that laches is a bar to an action where the alleged wrongdoing took place many years ago. An entirely different question, however, is presented when laches is held to bar a cause of action founded upon the current violation of a federal law and existing statutory contract. It was incumbent upon the District Court to meet these separate issues squarely and to render decision in such a manner as to place this case in proper posture for appellate review.

Another illustration of the failure of the District Court to do justice to important issues in this case is its conclusion with no support in the record, that granting of any relief "would create a concentric chaos". (Appendix A, p. 17a; see Petitioners' Court of Appeals Brief, p. 42.) Petitioners asserted in their complaint (R. 5, 42-43, see Lishman Affid. 179, 183) that the Respondent, far from acting in reliance upon any alleged acquiescence of Petitioners in the asserted wrongdoing, has conducted its affairs so as to antici-

pate an eventual rectification and to keep itself in a position to be able to respond to the type of equitable relief requested with a minimum of disruptive effect.

It is most material to the question of laches that Respondent has maintained its affairs in such a fashion as to be able readily to return Railroad's properties. It is also material to note that upon such return, the stockholders of Railway, as owners of 97% of the stock in Railroad, will continue to enjoy an only slightly, but properly, reduced interest in those properties. This readily available device for doing justice to the 3% stockholders of the Northern Pacific Railroad Company is not mentioned in the District Court's opinion. Instead, it conjures with the novel concept of "concentric chaos" in the face of the facts of record which establish the exact contrary. A careful examination of the available facts in documents (R. 5), the questioning of available expert witnesses as to the effect of the re-transfer of Railroad's properties back to it on the value of Respondent's securities or as to the effect upon operations of the facilities in question, and the development of detailed findings of fact on this point are the minimum of requirements imposed by the need for good judicial administration. In a summary judgment procedure, it was not possible, of course, to do any of these things.

CONCLUSION.

The courts below, by summary judgment of dismissal, have avoided their duty in a matter of far-reaching importance (Appendix D, p. 47a, Point II). If the facts sustain the existence of Petitioners' statutory contract rights in a railroad and railroad franchise, then the doctrine of laches has no application. Similarly, laches is inapplicable if the facts sustain that Respondent has been and is guilty of misuse of

the judicial process to the detriment of the Petitioners.

Good judicial administration requires that these matters establishing the inapplicability of the doctrine of laches should not be summarily ignored or dismissed as plausible argument (Appendix A, p. 11a). Rule 56 was never intended to abolish the right of Petitioners to establish in open court, after full inquiry and fair evaluation of admissible evidence (Appendix D, p. 47a, Point I), that they are being deprived of statutory property rights by means of consent decrees procured by fraud of the Respondent. Nor was this Rule intended to preclude Petitioners from establishing that institution of costly court action has been effectively hampered by Respondent's misuse of the consent decrees as conclusive adjudications that its 97% stock ownership in the federal corporation entitles it to all the benefits and advantages of the main line federal railroad established by the Act of July 2, 1864, and that Petitioners' 3% stock is valueless.

It is respectfully submitted, therefore, that certiorari should be granted at this time, and the decision of the Court below should be reviewed and reversed on the questions presented by this petition.

Respectfully submitted,

HENRY H. FOWLER,
ALEXANDER B. HAWES,
ROBERT W. LISHMAN,
MARX LEVA,
EDWARD BROWN WILLIAMS,
Attorneys for Petitioners.

FOWLER, LEVA, HAWES
& SYMINGTON,
Of Counsel.

August 8, 1955.